

AWS Response to the CMA’s Committed Spend Agreements Working Paper

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I. INTRODUCTION

1. AWS's response to the CMA's working papers and updated issues statement as published on 25 June 2024 ("**AWS's Public Response**") summarised its views on the CMA's Committed Spend Agreements Working Paper of 23 May 2024 (the "**CSA Working Paper**").¹
2. This response, [REDACTED], is supplementary to and should be read in conjunction with AWS's Public Response.² These submissions provide a more detailed explanation of certain points outlined in AWS's Public Response and present additional evidence as to why AWS's committed spend discounts ("**CSDs**") do not and cannot be expected to give rise to an adverse effect on competition ("**AEC**").^{3,4}
3. Fundamentally, the CSA Working Paper fails to provide a compelling legal framework or evidence to suggest that AWS's CSDs can, or do, harm competition by foreclosing rivals, and dismisses strong and consistent evidence to the contrary. CSDs are pro-competitive and greatly benefit customers. Only in exceptional circumstances, under specific, narrow conditions when structured in a way that forecloses rivals, can CSDs harm competition. However, the CSA Working Paper fails to set out or apply an appropriate empirical test to assess foreclosure and alleges a "link" between the ill-defined notion of "sticky" and contestable demand, which does not, and cannot, give rise to foreclosure.⁵ This novel concept of "sticky" demand is wholly inappropriate for assessing anti-competitive foreclosure effects. Rather, AWS has shown that in addition to having the ability to compete for virtually all levels of demand, rivals have the incentive to compete for as many workloads as possible.⁶
4. In the absence of any evidence that CSDs give rise to an AEC, as is the case here, intervention is unwarranted. Rather, the potential remedies considered in the CSA Working Paper risk eliminating the pro-competitive benefits of CSDs, in particular, for UK customers with CSDs benefitting from lower prices and for all AWS customers who benefit from the innovation and investments that AWS is able to provide based on stable and predictable revenue from CSDs. Given that CSDs are pro-competitive (which the CSA Working Paper itself acknowledges⁷), the potential restrictions on CSDs proposed in the CSA Working Paper would themselves equate to a restriction on competition, having adverse competitive effects and ultimately harming UK customers.

¹ AWS's Public Response, paragraphs 37-52.

² [REDACTED] AWS's Public Response, and [REDACTED] are together referred to as AWS's Response to the CSA Working Paper. [REDACTED].

³ [REDACTED].

⁴ CMA's Updated Issues Statement, paragraph 82; CC3 (Revised), Guidelines for market investigations: Their role, procedures, assessment and remedies, paragraph 154.

⁵ [REDACTED].

⁶ [REDACTED].

⁷ CSA Working Paper, paragraphs 1.9, 1.37-1.39, 2.103-2.113.

II. THE CMA'S CONCEPTUAL FRAMEWORK FOR ASSESSING WHETHER CSDs CAN HARM COMPETITION IS FLAWED⁸

A. The CSA Working Paper does not articulate a compelling theory of harm, and the evidence it relies upon does not substantiate any theory of harm based on economic theory⁹

5. To find an AEC in relation to CSDs, the CMA must present a coherent theory of harm and strong evidence proving, on a balance of probabilities, that CSDs “prevent, restrict or distort competition.”¹⁰ To be problematic from a competition perspective, CSDs must give rise to anti-competitive effects (*i.e.*, be capable of foreclosing as-efficient rivals) that negate their evidently pro-competitive benefits for customers. The emerging analysis in the CSA Working Paper fails on each of these fronts.¹¹ First, it does not sufficiently articulate a robust legal framework for assessing its claim that CSDs deter customers from considering alternative suppliers and an “incumbent” supplier can leverage existing demand.¹² The conceptual framework in the CSA Working Paper is inapt for assessing whether CSDs are harmful for competition. Second, the empirical evidence presented does not show that CSDs “can be expected to harm competition” when measured against the benchmark of a “well-functioning market.”¹³ This is not least because IT services in the UK are already a well-functioning market as defined in the CMA’s updated issues statement (*i.e.*, “where customers [are] able to choose between a range of alternatives and [are] able to multi-cloud and switch between products/providers”¹⁴).¹⁵ The only conclusion that the CMA can, and should, reasonably reach on the basis of the evidence presented is that CSDs do not give rise to an AEC. These significant methodological errors vitiate the emerging views in the CSA Working Paper.¹⁶
6. It is well established in legal precedent and economic theory that CSDs can only harm competition under narrow, specific conditions which give rise to anti-competitive foreclosure, *i.e.*, they need to be capable of foreclosing efficient rivals.¹⁷ None of these are met in this case.¹⁸ As a matter of sound policy, there should be consistency in assessing potentially harmful effects of discounting schemes whether under the Competition Act 1998 or the Enterprise Act 2002. Therefore, to assess the ability of CSDs to harm competition, there must be evidence of (actual or potential) anti-competitive or adverse effects. The CSA Working

⁸ [REDACTED].

⁹ [REDACTED].

¹⁰ Enterprise Act 2002, ss. 131(1) and 131(2); CC3 (Revised), Guidelines for market investigations: Their role, procedures, assessment and remedies, paragraphs 28-29, 163 and 319.

¹¹ As outlined in AWS’s Public Response, paragraphs 43-46.

¹² CSA Working Paper, paragraph 1.11.

¹³ CMA’s Updated Issues Statement, paragraph 82; CC3 (Revised), Guidelines for market investigations: Their role, procedures, assessment and remedies, paragraphs 30, 154, 319-320.

¹⁴ CMA’s Updated Issues Statement, paragraph 86.

¹⁵ See AWS’s Public Response, *e.g.*, paragraphs 2, 4, 6-26, 75, [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

Paper does not provide any evidence of such harmful foreclosure effects, nor is it capable of, given its inapt conceptual framework. AWS has set out the correct test and appropriate methodology for determining whether such harm can be expected to arise from CSDs.¹⁹ When the appropriate methodology is applied, the evidence clearly shows that AWS's CSDs are not capable of leading to foreclosure²⁰ and that the supply of IT services in the UK is indeed well-functioning, dynamic, and competitive. Any less stringent framework or test for foreclosure (or having no test for foreclosure at all) would undermine competition law, particularly in the context of discounts which directly benefit customers. There are strong economic and legal principles justifying a high standard of proof, as any incorrect conclusions would result in higher prices for customers and penalise companies for being more efficient.

7. There is strong evidence that there is effective competition in IT services in the UK, notwithstanding that AWS has been offering CSDs in response to customer demand and competition [X], and customers with CSDs multi-cloud. The fact that customers with CSDs multi-cloud means, by definition, that CSDs are not resulting in customers using AWS exclusively and other suppliers are able and incentivised to compete for new and existing workloads.²¹ Accordingly, the CMA's "theory of harm" that CSDs lead customers to concentrate their spend on one provider does not hold.

B. The analytical framework in the CSA Working Paper does not distinguish between pro-competitive and potential anti-competitive effects of CSDs²²

8. Across sectors, discounts are a means of price competition that greatly benefits customers. Only in very limited cases, depending on their structure, can certain discounts have anti-competitive rationale and effects, *i.e.*, the foreclosure of rivals. However, the CSA Working Paper does not provide any evidence that AWS's CSDs either do or could harm competition as it lacks any empirical test to distinguish between pro-competitive discounts and those exceptionally rare cases of discounts that could give rise to competition concerns through the foreclosure of rivals. All the CSA Working Paper demonstrates is that, in the context of renewals, AWS's discounts increase as customer commitments for future anticipated spend increase. This is simply the definition of volume discounting and would apply across all industries in which volume discounts are offered — IT services (including cloud services) is in no way unique. The fact that discounts increase as commitments increase says nothing about whether CSDs could lead to foreclosure and, by extension, an AEC. Therefore, a coherent theory of harm must be clearly articulated and needs to be supported by empirical evidence.

¹⁹ [X].

²⁰ [X], AWS's [X] submissions show that even less efficient rivals have the ability *and the incentive* to compete for customers' demand. [X].

²¹ [X].

²² [X].

C. The notion of “sticky” demand is the wrong framework, and its alleged existence is not supported by empirical evidence^{23,24}

9. The CSA Working Paper’s entire emerging view that CSDs could lead to foreclosure is built on an incorrect premise that is not supported by evidence. The CSA Working Paper asserts that “incumbents” benefit from an ability to “leverage” a material share of so-called “sticky” demand²⁵ into other portions of demand, while empirical evidence points to the contrary. The CSA Working Paper does not coherently explain or prove what makes a portion of certain suppliers’ demand “sticky” — in the CSA Working Paper, “sticky” demand seems to correspond to any existing demand (*i.e.*, current spend of customers as opposed to new spend) which therefore applies to *all* IT providers rather than “incumbents” only. Furthermore, even if some existing demand of IT providers was “sticky”, it would not prove that CSDs are anti-competitive, and the CSA Working Paper fails to articulate a coherent analysis framework or a credible theory of harm to demonstrate this, as explained at Sections II.A and II.B above.

i. The notion of “sticky” demand is ill-defined and not appropriate to assess effects on competition

10. The notion of so-called “sticky” demand is loosely defined in the CSA Working Paper and does not accurately represent any concept established in competition law or economic theory. The CSA Working Paper has not explained why this is the appropriate benchmark for a theory of harm based on a hypothetical non-contestable share of demand providing leverage in favour of AWS.
11. “Sticky” demand is defined inconsistently and incoherently throughout the CSA Working Paper. It is initially suggested that “sticky” demand is existing demand for which customers’ effective choice is “*limited by factors such as lack of suitable alternatives or barriers to switching.*”²⁶ However, the extent to which the lack of suitable alternatives is in fact relevant is unclear,²⁷ and in fact, there are many suitable alternatives to AWS.²⁸ More importantly, the CSA Working Paper appears to suggest that the relevant competitive assessment is whether customers “would,” rather than whether they “can,” switch.²⁹ Asserting that the test for

²³ [REDACTED].

²⁴ [REDACTED].

²⁵ CSA Working Paper, paragraph. 1.11.

²⁶ CSA Working Paper, paragraph 1.20(c)(i).

²⁷ Paragraph 1.20(c)(i) of the CSA Working Paper indicates that the availability of “close alternative options” influences the ability to leverage a portion of demand, whereas paragraph 2.47(c), conveniently, diminishes the importance of rivals being able to supply equivalent services to AWS, suggesting that alleged barriers to switching define “sticky” demand. There is no evidence of such barriers to switching: see AWS’s response to the CMA’s Technical Barriers Working Paper, submitted on 31 July 2024 [REDACTED] for further detail.

²⁸ [REDACTED].

²⁹ CSA Working Paper, paragraph 2.47(c): “*We are instead assessing if customers already using AWS cloud services would switch away their existing demand*” (emphasis added).

“sticky” demand is whether customers “would” switch away from AWS would entirely fail to account for customers not wanting to switch because they are satisfied with the quality and price of AWS’s services.

12. In contrast, established theories of harm regarding discounts are predicated on a material portion of demand being *non-contestable* by equally efficient rivals. “Sticky” demand, as described in the CSA Working Paper, does not equate to non-contestable demand. If a customer is *able* to switch their demand (which the customer survey evidence in the CSA Working Paper clearly shows is possible),³⁰ this demand is not non-contestable. If the existing demand is only “sticky” rather than non-contestable, this means the demand *is* in fact contestable and rivals can compete, therefore no leveraging theory of harm can credibly stand.
13. Moreover, there is no empirical evidence to suggest that AWS has a material portion of non-contestable demand.³¹ Instead, the evidence suggests the contrary, not least because of the dynamic nature of the IT services market and that AWS’s services are not “must-have” products (unlike, *e.g.*, Microsoft’s legacy software), and therefore do not represent immovable demand which can be leveraged. Indeed, the CSA Working Paper does not assert that there are certain AWS products or services for which demand is non-contestable or why it is non-contestable — the CSA Working Paper seems to imply that for every customer, irrespective of the products they purchase from AWS, a portion of their demand will always be “sticky”, which is entirely unproven.
14. Regardless, the very premise of the potential competition concern suggested in the CSA Working Paper is fundamentally incorrect: “incumbents” have no “leverage” from existing demand over incremental demand, and therefore this is no such “link”.³² The alleged “link” between existing (so-called “sticky”) demand and incremental demand posited in the CSA Working Paper as a “leverage” would apply to *any* firm offering volume discounts. By definition, discounts increase as the volume of purchases increase, and therefore for every supplier offering volume discounting there is an incentive to buy more, *i.e.*, increase existing demand. Therefore, the “link” the CSA Working Paper refers to simply corresponds to the fact that a higher discount is provided for higher volumes. It is highly misleading to characterise this as a “leverage” that incumbent providers could exert to expand their “strong position.”³³ This is why a credible theory of harm requires evidence of foreclosure. And yet, the CSA Working Paper does not provide any robust test or empirical evidence of how any alleged “link” between the novel concept of so-called “sticky” and contestable demand can foreclose rivals in this case. At the same time, AWS has empirically shown, [§<], that its CSDs are *not* capable of foreclosing rivals.³⁴

³⁰ CSA Working Paper, paragraph 2.61. See paragraph 18 below.

³¹ [§<].

³² CSA Working Paper, paragraph. 1.3, 1.13(c), and 1.20.

³³ [§<].

³⁴ [§<].

ii. The evidence presented in the CSA Working Paper does not support AWS having a material share of “sticky” demand

15. As “sticky” demand is the wrong criterion and the CSA Working Paper has not proven that AWS has non-contestable demand, the burden is not on AWS to prove that it does not have a material share of “sticky” demand. Notwithstanding this, AWS would like to highlight that the supporting evidence in the CSA Working Paper does not prove that AWS has *any* “sticky” demand, and empirical evidence corroborates this reality.
16. Even when adopting the inapposite concept of “sticky” demand, the CSA Working Paper does not provide any compelling evidence that there *is* such “sticky” demand nor that this is the case across a sufficient percentage of customers so as to be capable of foreclosing competitors. The customer survey evidence relied upon is extremely weak and purely anecdotal and does not suggest that AWS has a material share of “sticky” demand; such “sticky” demand allegations are wholly unjustified.
17. Specifically, only one customer said it would not be willing to switch any of its demand from AWS. Indeed, a few customers said that they were willing to switch all of their demand from AWS to alternative providers, and only a handful said they would not be willing to switch a portion (broadly defined as 20-66%) of their AWS demand.³⁵ Without access to the underlying customer survey evidence [§<], AWS is unable to accurately ascertain the prevailing view of customers. This “evidence” therefore cannot be relied upon to support the emerging view that AWS has a material share of “sticky” demand. More importantly, it is not clear how the CMA has sought to interpret these customers’ views, as there is no evidence to suggest that any unwillingness to switch is due to impediments to customer choice rather than satisfaction with AWS and the merits of its services. AWS is continuously innovating to meet customers’ needs and the survey evidence does not account for where customers *choose not to* switch, rather than *cannot*.
18. In fact, the evidence in the CSA Working Paper demonstrates that customers *do* have the ability to switch, which is the relevant legal and economic question, as “*many customers [...] said it was possible to switch away at least some services to alternative providers.*”³⁶ It is therefore unclear how the CSA Working Paper reaches the emerging view that AWS has a material share of “sticky” demand on the basis of this evidence, which leads to the opposite conclusion.
19. Customers’ ability to switch is borne out by the empirical evidence. Customers have plenty of credible alternatives available, and AWS has to compete to earn every workload as customers can *and do* switch.³⁷ They have the flexibility, even during the term of their CSD with AWS, to choose which IT provider best meets their needs for each next workload. This includes

³⁵ CSA Working Paper, paragraph 2.59.

³⁶ CSA Working Paper, paragraph 2.61(a).

³⁷ AWS’s Public Response, *e.g.*, paragraph 4(b). [§<].

flexibility in term length which give customers the choice to allocate a workload for one or a few years to a certain provider. Customers drive CSDs, and AWS is responding to demand for discounted prices. For example, at renewal, customers have total flexibility about where to run their IT services. They may choose to increase their volumes for a larger discount (as this is how volume discounting works), but any other competitor can, and does, compete for that same piece of business, no matter how large or small it is.

20. Irrespective of how it is described, the existence of “sticky” demand in itself does not mean there is any harm to competition. Several other conditions must be met for foreclosure to occur, which the CMA has not demonstrated to be the case. Moreover, AWS has provided empirical evidence showing such conditions are not met.³⁸

D. The alleged high market coverage of CSDs presupposes collective dominance or tacit collusion between AWS and Microsoft, which the CSA Working Paper neither claims nor evidences³⁹

21. High market coverage of AWS’s CSDs would not in itself be sufficient evidence that AWS’s CSDs can foreclose competition. In any event, AWS has shown compellingly that the coverage attributable to AWS’s CSDs in itself is too low to warrant foreclosure concerns, even under very conservative calculations.⁴⁰ The CSA Working Paper finds high market coverage of CSDs by arbitrarily asserting that “*CSDs of rivals are also relevant and should be included in the calculation*”,⁴¹ thus erroneously combining AWS’s and Microsoft’s share of revenue when calculating the coverage of CSDs. This is a major methodological flaw in the CSA Working Paper, for which no compelling explanation is provided. Treating rivals, specifically AWS and Microsoft, as a single entity with singular aims and discount structures can only be predicated on an implicit assumption of collective dominance or tacit collusion, which the CSA Working Paper neither articulates nor proves. In any event, such collective dominance or tacit collusion is entirely implausible based on market reality and disregards the intense competition between AWS and Microsoft.
22. Collective dominance or tacit collusion cases are few and far between in the UK and the EU, and for good reason, as the evidentiary threshold is extremely high. Evidencing collective dominance demands the cumulative presence of certain market characteristics which are rarely met.

³⁸ [REDACTED].

³⁹ [REDACTED].

⁴⁰ [REDACTED].

⁴¹ CSA Working Paper, paragraphs 2.7 and 2.13.

23. In this case, key market characteristics that *must* be present for a credible theory of collective dominance or tacit collusion are plainly absent.⁴² First, this is not a highly concentrated, oligopolistic sector, which makes any assertion that competitors have higher incentives to coordinate than to compete implausible. This sector is, indeed, anything but oligopolistic given the number of strong rivals active and growing. It is even less plausible that there would be incentives to coordinate between only two players (AWS and Microsoft), despite the presence of a vast number of innovators vying to increase their share of supply. Second, the sector is highly dynamic, with rivals' relative positions and shares of supply changing significantly over time, as the reduction of AWS's own share shows.⁴³ Third, it is difficult to fathom how coordination would be feasible in a sector defined by innovation and product differentiation, with marked product heterogeneity and a variety of complex discounting structures. Fourth, customers in this industry have significant buyer power and multiple available options, which is particularly apparent with respect to CSDs. Finally, while the market for IT services is highly transparent for customers, [§<]. The market realities of this industry make it inconceivable to consider AWS and Microsoft acting as a collective entity from an economic point of view,⁴⁴ or that AWS and Microsoft could consider it possible, economically rational, and therefore preferable, to adopt on a lasting basis a "common policy" with the aim of selling at above competitive prices without any actual or potential competitors, let alone customers, being able to react effectively.⁴⁵
24. More specifically:
- a. Both the evidence throughout the working papers and empirical evidence demonstrates that the market for IT services is characterised by a high degree of competition from numerous IT providers continuing to innovate and new IT providers continuing to enter.^{46,47} Moreover, the CSA Working Paper's own emerging view that potential remedies may only apply to AWS and Microsoft, implicitly acknowledges

⁴² These market characteristics have been established by the courts in the leading cases in this area, *e.g.*, Case T-28/93 *Compagnie Maritime Belge & Others v Commission* Case C-396/96P and Case C-395/96P *Compagnie Maritime Belge & Others v Commission*; C-68/94 and C-30/95, *France and SCPA v Commission*, EU:C:1998:148; Case T-102/96, *Gencor v Commission* EU:T:1999:65; Case C-309/99, *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* EU:C:2002:98; Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585; C-413/06 P - *Bertelsmann and Sony Corporation of America v Impala* EU:C:2008:392; Case T-296/09, *European Federation of Ink and Ink Cartridge Manufacturers (EFIM) v Commission* EU:T:2011:693.

⁴³ AWS's Public Response, paragraph 19. [§<].

⁴⁴ Case C-396/96P and Case C-395/96P, *Compagnie Maritime Belge & Others v Commission* [1996] ECR 1201; [2002] 4 CMLR 1076, paragraph 36.

⁴⁵ Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585, paragraph 61.

⁴⁶ [§<].

⁴⁷ See, *e.g.*, Case C-309/99 *Wouters v Algemene Raad van de Nederlandsche Orde van Advocaten* EU:C:2002:98, paragraph 114, where the European Court of Justice held that in the absence of structural links on a market, collective dominance would not be found in a market which is highly heterogeneous and characterised by a high degree of internal competition.

that at least Google, as well as IBM, Oracle, and OVHcloud, fall outside any alleged coordinated behaviour, which makes any form of collusion simply unfeasible, as these strong, large rivals act as challengers and would counteract any hypothetical “common policy”.⁴⁸ CSDs are a key tool of price competition between all suppliers, and AWS and Microsoft are incentivised to, and do, compete fiercely both with each another and the myriad of other IT providers, on different aspects of their discount structures to win every workload. This is in stark contrast to the evidence required to establish any credible theory of collective dominance, *e.g.*, lack of effective competition between AWS and Microsoft and the weakness of competitive pressure that might be exerted by other players.⁴⁹

- b. The dynamic nature of this industry is not conducive to tacit collusion, as market conditions frequently change with rivals’ shares of supply fluctuating dramatically over time and new players entering and growing.⁵⁰ Not only does this make any coordination between players effectively impossible, but firms would have strong incentives to depart from any hypothetical “common policy” in order to win market share.⁵¹ Indeed, by the CMA’s own estimates, AWS’s share of supply of cloud computing services has decreased from 2019 to 2022, and this decrease further accelerated in 2023.⁵² Moreover, as AWS pioneered the development of cloud services, at one point it held 100% of the cloud services segment and has since dropped significantly lower to between 40 and 50% by 2022, by the CMA’s own estimates.⁵³
- c. The supply of IT services is characterised by intense competition by firms rapidly innovating and differentiating their products and services for the benefit of customers.⁵⁴ Such highly differentiated and asymmetric product offerings render any incentive or ability to collude obsolete. Moreover, given product differentiation and innovation is a competitive tool to win market share in this industry, any hypothetical tacit collusion would be simply unsustainable.⁵⁵ The differentiated nature of discount structures is a key aspect of competition between all IT providers and means that firms are incentivised to, and do, win business by competing on these different aspects.

⁴⁸ See, *e.g.*, Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585, paragraph 277.

⁴⁹ Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585, paragraph 63.

⁵⁰ See Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585, paragraphs 111 and 139; Case T-296/09, *EFIM v Commission* EU:T:2011:693, paragraphs 72-76.

⁵¹ Tacit collusion is only feasible if it is sustainable, which requires that the parties have no incentives to deviate. See, *e.g.*, Case T-342/99, *Airtours plc v Commission*, EU:T:2002:146, paragraph 62.

⁵² [§].

⁵³ AWS’s Public Response, paragraph 19. [§].

⁵⁴ See, *e.g.*, AWS’s Public Response, paragraphs 6, and 20-23; [§].

⁵⁵ See Case T-342/99, *Airtours plc v Commission*, paragraph 62.

d. Customers exert strong buyer power (as is particularly evident in the context of negotiating CSDs) and have multiple options for obtaining their IT needs, such that customers can, and do, switch to alternative providers if they prefer the quality and/or price of their services.⁵⁶ Such customer behaviour precludes the sustainability of any hypothetical “common policy” and therefore the possibility of collusion.⁵⁷

e. [REDACTED].^{58 59}

25. Fundamentally, there is no evidence in the CSA Working Paper, or indeed any of the CMA’s working papers, to suggest a lack of competition between AWS and Microsoft (and only strong evidence to the contrary), or that the market for IT services exhibits any of the features that make any notion of tacit collusion plausible. Therefore, there is no risk of the harmful competitive effects associated with such conduct arising, and no prospect of CSDs leading to foreclosure absent dominance or sufficient market coverage.

E. Assessing whether CSDs influence customer decisions on workload allocation is not relevant to competitive harm⁶⁰

26. Assessing whether customer choice, in relation to the allocation of customers’ workloads, is affected by CSDs is not relevant to the assessment of whether CSDs can harm competition.⁶¹ In fact, customers are expected, and want, to consider discounts when choosing IT providers as they provide direct customer benefits — in a well-functioning market, customers are expected to respond to lower prices, and therefore the fact that customers respond to discounts when making decisions about where to run their workloads simply reflects the demand curve for virtually every product and industry. Assessing whether CSDs influence customers’ decisions on workload allocation is entirely different to whether CSDs reduce customer choice of alternative suppliers or services. Indeed, the CSA Working Paper suggests that customers’ *decisions* may be affected even if they can switch or multi-cloud,⁶² clearly indicating the availability of alternatives. Moreover, the emerging view from the summary of the customer survey evidence in the CSA Working Paper⁶³ is that CSDs are — at best — one of

⁵⁶ See, e.g., AWS’s Public Response, paragraphs 12-19, [REDACTED].

⁵⁷ For tacit collusion to be feasible, suppliers must be able to act independently of customers and competitors. Such strong buyer power would jeopardise the results of any hypothetical “common policy”. See Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585, paragraphs 62, 270-277.

⁵⁸ Tacit collusion is not sustainable in markets which are not transparent. An essential precondition for an effective threat of retaliation in the event of deviation from an alleged common policy is that the market is sufficiently transparent to allow firms to detect the need for retaliation. See, e.g., Case T-342/99, *Airtours plc v Commission*, paragraph 62.

⁵⁹ See Section V.iv below.

⁶⁰ [REDACTED].

⁶¹ CSA Working Paper, paragraph 2.18.

⁶² CSA Working Paper, paragraphs 2.21-2.22.

⁶³ [REDACTED].

many factors influencing customer decisions. In any event, the relevant question is not whether CSDs and prices influence customers' choice, but whether they lead to foreclosure.

F. Other methodological errors in the CSA Working Paper⁶⁴

27. As recognised in the CSA Working Paper, individualised discounting is not problematic from a competition perspective.⁶⁵ [REDACTED].^{66 67 68}
28. The data analysis presented in the CSA Working Paper to assess the share of customers' overall demand that is "in practice" covered by commitments is meaningless.⁶⁹ As the CSA Working Paper itself acknowledges, it only accounts for spend on AWS services and does not account for customers' total addressable spend. The inclusion of this analysis in the CSA Working Paper is therefore misleading and results in bias. In fact, if customers' commitments closely align with their actual spend on AWS, this would be optimal for customers as it helps them achieve the greatest cost savings by securing the discount that aligns with their anticipated spend and helps them avoid missing their commitment.⁷⁰
29. By focusing only on the discounting practices of AWS and Microsoft, the CSA Working Paper disregards the ability of other cloud providers to compete on price (including through discounts).⁷¹ As a result, the CSA Working Paper fails to account for an important mitigating factor to any alleged, potential "lock-in" effect of AWS and Microsoft CSDs, *i.e.*, competitors can use their own CSDs to win demand and counter any potential impact of AWS and Microsoft CSDs (other than the impact of healthy price competition, which is pro-competitive). This is demonstrated in other public responses to the CSA Working Paper which highlight discounts as an important competitive tool for IT providers, including smaller cloud services providers, to compete for customers' workloads.⁷² Instead of going through the painstaking exercise of demonstrating why rivals' discounts are not a sufficient constraint, the CSA Working Paper dismisses CSDs offered by other providers on the basis that they "*have slightly different characteristics*" to those offered by AWS, Microsoft, and Google,⁷³ which are largely customer specific factors and therefore not probative. In the absence of this analysis, it relies

⁶⁴ [REDACTED].

⁶⁵ CSA Working Paper, paragraph 2.6(a): "*individual negotiation is not a necessary condition for a CSD to be harmful to competition.*"

⁶⁶ CSA Working Paper (Confidential), paragraphs 1.20(c)(ii), 2.67, and 3.46, AWS Box 1, pp.34-36.

⁶⁷ See Section IV.B.ii below for further detail.

⁶⁸ [REDACTED].

⁶⁹ CSA Working Paper, paragraphs 2.65-2.66, 2.73-2.79.

⁷⁰ [REDACTED].

⁷¹ [REDACTED] other IT services providers are an essential part of the competitive landscape.

⁷² See Google Cloud's response to the CMA's Committed Spend Agreements working paper dated 23 May 2024, paragraphs 12-15.

⁷³ CSA Working Paper, paragraph 1.34.

on the unproven assertion of material “sticky” demand as “proof” that rivals cannot match AWS’s and Microsoft’s discounts. This is simply unconvincing.

III. CSDS ARE PRO-COMPETITIVE: CSDS DIRECTLY BENEFIT CUSTOMERS AND GENERATE EFFICIENCIES

30. In light of the lack of any evidence to the contrary, the only possible conclusion is that AWS’s CSDs are pro-competitive and greatly benefit customers. Primarily, CSDs have pro-competitive effects as they are a vehicle of price competition between suppliers, directly benefiting customers with lower prices. CSDs provide ongoing cost reductions for customers to more efficiently run and grow their businesses. In addition, CSDs promote customer choice and switching. They are one way that many IT providers across the industry provide discounts and one of the many ways in which they compete to attract new and existing workloads. Moreover, CSDs empower customers to achieve cost savings from the start of their contract, ensuring they obtain the best, most competitive deal available, and give them predictability to better plan and manage their IT solutions.
31. On top of these pro-competitive effects, CSDs help IT providers better plan and acquire necessary capacity and infrastructure, generating efficiencies across the industry. [REDACTED].^{74,75} [REDACTED]. This confidence and visibility into the future is exactly what all businesses want when planning capacity or investing into new projects, and more generally inform their investment decisions. Firms that do not benefit from relatively stable revenue have to plan more conservatively, with higher risk buffers, when considering investing into new capacity. This reduces investment incentives compared to a situation in which firms can rely on a guaranteed level of revenue.
32. [REDACTED].

IV. THE CSA WORKING PAPER REFLECTS A FUNDAMENTAL MISUNDERSTANDING OF HOW AWS’S CSDS WORK

A. The structure of AWS’s CSDs does not give rise to competition concerns

i. AWS’s CSDs are not “retroactive rebates”⁷⁶

33. The characterisation of AWS’s CSDs as “retroactive rebates” is factually inaccurate⁷⁷ - customers determine *up front* how much they want to spend based on the volume of AWS services they expect to consume and make that commitment at the outset. [REDACTED]. On this basis, there is nothing “retroactive” about AWS’s CSDs. This is transparent, healthy competition.

⁷⁴ [REDACTED].

⁷⁵ [REDACTED].

⁷⁶ [REDACTED].

⁷⁷ [REDACTED].

ii. The structure and level of AWS's CSDs are such that efficient competitors can compete for customers' incremental demand

34. [REDACTED].⁷⁸ [REDACTED].⁷⁹

B. CSD negotiations are driven by customers and customer-choice

35. [REDACTED].⁸⁰

36. [REDACTED].^{81 82 83} Customers [REDACTED], can, and do, choose to place some of their demand with another provider. This reflects healthy competition on the merits. Winning workloads by offering competitive prices and discounts cannot be deemed to harm competition per se, contrary to what the CSA Working Paper suggests.

37. [REDACTED].

i. The CSA Working Paper mischaracterises AWS's CSDs based on its interpretation of AWS's internal documents

38. [REDACTED].^{84 85}

39. [REDACTED].^{86 87 88}

40. [REDACTED].^{89 90}

41. [REDACTED].^{91 92 93}

ii. [REDACTED]

78 [REDACTED].

79 [REDACTED].

80 [REDACTED].

81 [REDACTED].

82 AWS's Public Response, paragraph 41.

83 [REDACTED].

84 [REDACTED].

85 [REDACTED].

86 [REDACTED].

87 [REDACTED].

88 [REDACTED].

89 [REDACTED].

90 [REDACTED].

91 [REDACTED].

92 [REDACTED].

93 [REDACTED].

42. [REDACTED].^{94 95 96}

43. [REDACTED].^{97 98}

44. [REDACTED].⁹⁹

V. THE POTENTIAL REMEDIES SUGGESTED IN THE CSA WORKING PAPER ARE UNWARRANTED

45. There is no evidence that CSDs give rise to an AEC and therefore no remedies are warranted.¹⁰⁰ Instead, all potential remedies risk eliminating the pro-competitive benefits of CSDs, in particular for customers, including from individually negotiated discounts, and from stable revenues.¹⁰¹ Given that CSDs are pro-competitive, the restrictions on CSDs proposed in the CSA Working Paper would equate to a restriction on competition which would therefore be anti-competitive and have adverse effects on competition.

46. [REDACTED], the burden of proof is on the CMA to demonstrate that remedies are necessary and proportionate by proving that CSDs give rise to an AEC, and to consider any potential negative effects in line with the framework set out on the Market investigation guidelines.¹⁰² AWS is not required to demonstrate that remedies should not be imposed because, for instance, they would have unintended consequences, as any intervention would be an unjustified restriction on how AWS runs its business and competes. Notwithstanding this, and the fact that there is no evidence that CSDs can be expected to harm competition, to assist the CMA, AWS has provided further detail on its views that the potential remedies proposed in the CSA Working Paper would harm competition in the UK and UK customers, and risk stifling innovation in the UK.¹⁰³

i. Banning the use of discounts based on commitments¹⁰⁴

47. CSDs are driven by customers who want the best possible cost savings. [REDACTED], by obtaining commitments from customers, IT providers are more willing and better able to provide customers with greater discounts from the start of the contract, as they have certainty that customers will spend the amount that corresponds to the discount afforded to them.

94 [REDACTED].

95 [REDACTED].

96 [REDACTED].

97 [REDACTED].

98 [REDACTED].

99 [REDACTED].

100 See AWS's Public Response, paragraph 47, for further detail.

101 See Section III above.

102 As set out in the Potential Remedies Working Paper, pp.6-8 and CC3 (Revised), Guidelines for market investigations: Their role, procedures, assessment and remedies.

103 AWS's Public Response, paragraphs 47-52.

104 CSA Working Paper, paragraphs 3.14-3.22.

Removing this option would limit customers' bargaining power and ability to obtain the same discounts from the first dollar they spend from the start of their CSD, which would lead to higher prices for UK customers and businesses in the UK.¹⁰⁵ Discounts are obviously very important to customers, particularly smaller customers, public sector customers, and start-ups, with more limited resources, which is clear from the responses to the CMA's issues statement,¹⁰⁶ and CSA Working Paper.¹⁰⁷ Commitments themselves are therefore pro-competitive and limiting pricing discretion in this way would in fact lead to adverse effects on competition. In addition, any proposed discount structure that removes commitments and requires rebates to be given to customers after they have incurred spend would be considerably less favourable for UK businesses, particularly given the levels of spend in the IT services market.

48. Moreover, as explained at Section III above, commitments ensure stable and predictable revenue [REDACTED].^{108 109 110}

49. [REDACTED].

50. [REDACTED].

ii. Restrictions on the structure of any volume-related discounts¹¹¹

51. Restrictions on the structure of volume-based discounts, including imposing a cap on the level of discounts that IT providers can offer, would reduce competition and lead to worse outcomes for customers and AWS.¹¹²

52. The stepped-discount structure design proposed in the CSA Working Paper would negatively impact customers, [REDACTED]. Under this structure, the effective price customers pay would have to be calculated by taking into account all discount tiers and applying them to the respective spend values. This is more complex, time-consuming, and less intuitive for a customer to understand, and would create challenges for customers in terms of predictability and monitoring their IT spend. From the limited detail provided in the CSA Working paper, it is unclear whether the proposed design envisages stepped discounts with or without commitments. [REDACTED]. More complex offerings would be far less beneficial for customers and

¹⁰⁵ AWS's Public Response, paragraph 50.

¹⁰⁶ See Startup Coalition's response to the issues statement dated 17 October 2023, p.2; CCIA's response to the issues statement dated 17 October 2023, p.3; and ACT's response to the issues statement dated 17 October 2023, p.5.

¹⁰⁷ See Startup Coalition's response to the CMA's Working Papers, pp. 1-2.

¹⁰⁸ [REDACTED].

¹⁰⁹ [REDACTED].

¹¹⁰ [REDACTED].

¹¹¹ CSA Working Paper, paragraphs 3.34-3.39.

¹¹² See AWS's Public Response, paragraph 51, for further detail.

can be expected to be less competitive, especially if only imposed on two providers (*i.e.*, AWS and Microsoft).

iii. Maximum duration for CSDs¹¹³

53. [X]. Customers want the flexibility of choosing the term that matches their predicted future usage of AWS services. Customers' increasing sophistication for cloud usage means that projects are now typically larger and run for longer thereby requiring longer time horizons, and IT providers must offer corresponding discounting to provide meaningful support. Restricting these options would directly reduce customer choice and detrimentally affect customers' ability to plan their IT spend over the longer term.

54. [X].

iv. Potential information remedies¹¹⁴

55. Requiring IT providers to publish their discount structures would not simply lead to greater transparency and bargaining power for customers, [X]. Rather than increase competition, this would reduce competition and potentially result in identical discount structures across IT providers [X]¹¹⁵.

56. Where intervention also envisages IT providers following their published schedules and eliminating individual negotiations, this would introduce an effective price control and soften competition by removing *customers'* ability to negotiate discounts (which is pro-competitive). Removing the ability for customers to exert their bargaining power could be particularly harmful for customers who are unable to make standard spend commitments, such as start-ups or customers experiencing short-term industry downturns. This could also significantly affect public sector customers [X].

57. [X].

v. Application to certain providers

58. The CSA Working Paper contemplates potential remedies only applying to certain providers.¹¹⁶ For the avoidance of doubt, the proposed remedies should not apply to *any* providers. Notwithstanding this, potential remedies should *certainly* not only apply to AWS and Microsoft, but to all IT providers. Imposing a restriction only on AWS and Microsoft would lead to a significant distortion of competition and significantly harm AWS's ability to compete for customers, and continue to innovate and improve its services, resulting in a market that is less competitive overall and detrimental effects for customers. Moreover, there should be a level

¹¹³ CSA Working Paper, paragraphs 3.23-3.33.

¹¹⁴ CSA Working Paper, paragraphs 3.40-3.49.

¹¹⁵ See Section II.D above.

¹¹⁶ See, *e.g.*, CSA Working Paper, paragraphs 3.22(b), 3.33(a), and 3.49.

regulatory playing field in this highly competitive space where CSDs are a key tool for competition between all IT providers. [REDACTED].

vi. Geographic scope of potential remedies

59. The CMA imposing geographic customer definitions is not suitable in a business-to-business industry like cloud services where customers' contracts are held at multiple levels and with entities not in the UK, sometimes under a single global contract, and/or with UK entities covering customers' operations globally (as acknowledged in the CMA's Potential Remedies Working Paper).¹¹⁷ Given the scope of the CMA's market investigation is to assess competitive conditions in the supply of cloud services *in the UK*, as a matter of principle, any potential remedies, *if required*, should apply only to customers' operations in the UK. Classifying customers based on billing address or by both billing address and where they are headquartered, does not appropriately cater for this as it does not show where the services are provided, which is standard practice when applying remedies.
60. Any intervention that restricts CSDs and leads to higher prices for customers making the UK less competitive would risk isolating the UK, as customers would seek similar discounts and alternative options for sourcing their services. [REDACTED].
61. Introducing an additional parameter for geographically classifying customers based on where they are headquartered would equally be unsuitable and potentially harmful for the UK. [REDACTED]. This would have the overall effect of driving down cloud consumption in the UK. [REDACTED]. At the same time, only large multinational corporations could rely on such a strategy to mitigate the negative effects for certain workloads while domestic UK-only customers would be required to pay higher prices, making them less competitive in the global market for IT services.

VI. CONCLUSION

62. Throughout this market investigation, AWS has shown that CSDs are overwhelmingly pro-competitive and the CMA has provided no compelling evidence that they can be expected to harm competition by reducing the ability or incentive of rival suppliers to compete for each other's existing customers or leading to the weakening or marginalisation of some suppliers.¹¹⁸ Therefore, there is no evidence to support any potential finding of an AEC.
63. The CMA's emerging proposed interventions are not only unwarranted but would result in UK customers paying higher prices, particularly compared to customers outside the UK, putting them at a competitive disadvantage and introducing impediments to their growth. This would threaten the overall growth and competitiveness of the UK, particularly if this results in UK customers (or indeed business outside the UK) preferring alternative, more competitive jurisdictions.

¹¹⁷ CMA's Potential Remedies Working Paper of 6 June 2024, paragraph 3.11.

¹¹⁸ CSA Working Paper, paragraph 1.11; CMA's Updated Issues Statement, paragraph 58.

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